82-1591

No.

Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Clean Air Act prohibits EPA from allowing a state to adopt a plantwide approach to new source review in nonattainment areas in circumstances where the state can demonstrate that its state implementation plan including such a new source review program contains all of the elements required by the Clean Air Act and provides for timely attainment and maintenance of air quality standards.

PARTIES TO THE PROCEEDING

In addition to the Natural Resources Defense Council, respondents include Citizens for a Better Environment, Inc. and the Northwestern Ohio Lung Association, Inc. Nominal respondents include Chevron USA, Inc. (petitioner in No. 82-1005) and the American Iron and Steel Institute, the American Petroleum Institute, the Chemical Manufacturers Association, General Motors Corporation, and the Rubber Manufacturers Association (petitioners in No. 82-1247). Other respondents under Rule 19.6 include various member companies of two of the organizations that are petitioners in No. 82-1247, and a group of 81 electric power generating companies and two electric utility trade associations, all of which were intervenor-respondents in the court of appeals. Those additional respondents are listed at 82-1247 Pet. iii nn.1, 2 and 3.

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NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (82-1005 Pet. App. A-1 to A-20) is reported at 685 F.2d 718.[1]

[1] The petitions in No. 82-1005, *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, et al.*, and No. 82-1247, *American Iron and Steel Institute, et al.* v. *Natural Resources Defense Council, et al.*, also seek review of the judgment of the

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1982. Timely petitions for rehearing were denied (82-1005 Pet. App. B-22 to B-25) on October 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Air Act, 42 U.S.C. (Supp. IV) 7401 *et seq.*, are reproduced at 82-1247 Pet. App. 1a-10a. Pertinent portions of implementing regulations, 40 C.F.R. 51.18(j), are reproduced at 82-1247 Pet. App. 32a-33a.

STATEMENT

This case presents a question as to the meaning of the term "stationary source" as it is employed (without any explicit statutory definition) in key provisions of the 1977 Amendments to the Clean Air Act. Those provisions require states that had not, by 1977, met national air quality standards established under statutory authority by the Environmental Protection Agency to establish permit programs regulating the construction of "new or modified major stationary sources" of air pollution. To fill the definitional void left by the statute, in October 1981, after allowing for notice to the public and consideration of comments received, the Environmental Protection Agency adopted by regulation a definition that had earlier been proposed in 1979. The 1981 regulation permits

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court of appeals in this case. We will not respond separately to these petitions. Because the materials required to be reproduced by Rule 21(k) are included within the previously filed petitions we refer to those petitions where appropriate, rather than duplicating the materials found there.

the states to adopt a "plantwide" definition of "stationary source" that treats an entire industrial plant as single source. It thus exempts from the formal new source review process addition of equipment and modifications to existing equipment within a plant if increased emissions from the new or modified unit are offset by corresponding decreases from another unit within the plant so that aggregate plant emissions do not increase more than de minimis amounts. Under the 1981 regulations the states also retained the option to treat each component of a plant as a separate source. Thirty-one states have to date availed themselves of the plantwide source definition and have sought to modify the state implementation plans required under the Act to incorporate that approach. In this case, however, the United States Court of Appeals for the District of Columbia Circuit invalidated the EPA's 1981 regulations, concluding that the general purposes of the 1977 Amendments to the Act left the Agency with no discretion to sanction a plantwide definition in this context.

1. As amended in 1970, the Clean Air Act established a federal-state partnership which recognizes that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. 1857(a)(3) and 42 U.S.C. (Supp. IV) 7401(a)(3).[2] The Environmental Protection Agency ("EPA") was

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[2] At the time of the 1970 Amendments, Pub. L. No. 91-604, 84 Stat. 1676, the Act was codified at 42 U.S.C. 1857 *et seq.* In 1977 the Act was further amended. As amended, the Act was reclassified to 42 U.S.C. (Supp. IV) 7401 *et seq.* Where reference is made to pre-1977 provisions that were not materially changed by the amendments of that year citations to both the former and present codifications are provided.

required to establish a set of primary and secondary National Ambient Air Quality Standards ("NAAQS"). Section 109, 42 U.S.C. 1857c-4 and 42 U.S.C. (Supp. IV) 7409.[3] The primary NAAQS, were to be designed to protect the public health, while the secondary NAAQS were designed to protect public welfare.

Following promulgation of the NAAQS by EPA, each state was required to adopt a plan, known as a "state implementation plan" or "SIP," to attain and maintain the EPA-promulgated NAAQS by the deadlines established in the Act. Sections 107(a) and 110(a)(2), 42 U.S.C. 1857c-2(a) and 1857c-5(a)(2) and 42 U.S.C. (Supp. IV) 7407(a) and 7410(a)(2). For primary standards this date was generally 1975. If the SIP provided for timely attainment and maintenance of the NAAQS and otherwise complied with the requirements of the Act, the Administrator was required to approve it. Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2) and 42 U.S.C. (Supp. IV) 7410(a)(2).

2. Many areas of the country failed to attain the primary NAAQS by the deadlines established in the 1970 amendments. Congress accordingly amended the Act in 1977 to address this problem. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. In Part D of Title I of the amended act[4] Congress adopted special provisions to be applied in the so-called nonattainment areas. Congress directed the states to submit substantially revised SIPs for the Administrator's approval. In order to be approved

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[3] Pursuant to this authority, the Administrator has promulgated primary and secondary NAAQS for sulfur dioxide (SO_2), particulate matter, carbon monoxide (CO), nitrogen dioxide (NO_2), photochemical oxidants and lead. 40 C.F.R. Part 50.

[4] 42 U.S.C. (Supp. IV) 7501-7508.

by the Administrator, a revised SIP was required to provide for attainment of the primary NAAQS by December 31, 1982.[5] In addition, revised SIPs were required to comply with the provisions of Section 172(b) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7502(b), including, *inter alia*, implementation of all reasonably available control measures as expeditiously as practicable, annual incremental reductions in emissions from existing sources leading to "reasonable further progress" toward attainment, and a permit program governing construction of "new or modified major stationary sources" of air pollution.[6]

The permit program for new or modified sources is commonly referred to as the new source review program. Section 173, 42 U.S.C. (Supp. IV) 7503, established four mandatory elements for such a program. First, permits to construct may be issued only if the owner or operator of a proposed new or modified major source obtains sufficient emission reductions in the region to offset the increased emissions from that source, and allow for reasonable further

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[5] 42 U.S.C. (Supp. IV) 7502(a)(1). If a state demonstrated that it could not meet the 1982 deadline for attainment of the primary NAAQS for carbon monoxide and ozone, the Administrator was authorized to grant further extensions to December 31, 1987. 42 U.S.C. (Supp. IV) 7502(a)(2).

[6] Section 172(b)(2) and (3), 42 U.S.C. (Supp. IV) 7502(b)(2) and (3). A stationary source is defined as a "major" one if it "directly emits or has the potential to emit, one hundred tons per year or more of any air pollutant * * *." Section 302(j), 42 U.S.C. (Supp. IV) 7602(j). An existing major source is "modified" whenever its emissions increase by more than a de minimis amount, as determined by EPA. See Sections 111(a)(4) and 171(4), 42 U.S.C. (Supp. IV) 7411(a)(4) and 7501(4); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979).

progress toward attainment, or, alternatively, if the increased emissions will not exceed an allowance for growth budgeted by the state pursuant to Section 172(b)(5), 42 U.S.C. (Supp. IV) 7502(b)(5). See Section 173(1), 42 U.S.C. (Supp. IV) 7503(1). Second, the source must be equipped with state-of-the-art emissions controls meeting a standard described as the "lowest achievable emission rate." Section 173(2), 42 U.S.C. (Supp. IV) 7503(2). Third, the permit applicant must certify that all the other sources owned, operated, or controlled by him in the state are in compliance with the applicable SIP. Section 173(3), 42 U.S.C. (Supp. IV) 7503(3). Finally, no permit may be issued unless the state is carrying out the applicable implementation plan for the nonattainment area in which the proposed source is to be located. Section 173(4), 42 U.S.C. (Supp. IV) 7503(4).

To prevent further degradation of air quality in nonattainment areas while the states formulate their revised SIPs, Congress required each state to impose a limited conditional moratorium on the construction or modification of major stationary sources in such areas until EPA approves a revised Part D SIP. Section 110(a)(2)(I), 42 U.S.C. (Supp. IV) 7410(a)(2)(I).

3. Although the new source permit review program and the construction moratorium each apply to "major stationary sources," the term "source" is not defined in the Act for the purposes of the nonattainment program. Since enactment of Part D, two competing constructions of the term source have been suggested. Under the first, a plantwide definition, an entire plant is treated as a "source."[7] Under such a

[7] Such a definition is frequently described as employing a "bubble" concept.

definition, when emissions from one process unit within the plant are increased, or a new process unit is added, the change need not undergo formal new source review if the operator can reduce emissions of the same pollutant elsewhere within the plant so that total emissions do not increase by more than a de minimis amount.[8] Under an alternative construction of the statute, each process unit within a plant is viewed as a "source;" any major new process unit or any significant increase in emissions from an existing unit triggers formal new source review, even if aggregate emissions from the plant of which the unit is a part decrease or remain the same.

b. In 1979, EPA proposed regulations to govern the new source review programs contained in revised SIPs required by Part D of the amended Clean Air Act. 44 Fed. Reg. 51924, 51933. These rules would have permitted states with approved revised SIPs to adopt a "plantwide" definition of source. States without approved revised SIPs, however, would have been required to use a unit-by-unit definition of source under which emissions from each part of a plant were reviewed individually. *Ibid.*

In the final new source review regulations promulgated on August 7, 1980, the Agency reversed itself. It adopted what is commonly referred to as the "dual definition" of "stationary sources." Under that definition, both an entire plant and discrete pieces of pollutant-emitting equipment within a plant were treated as "sources."[9] The states were therefore re-

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[8] That is, if total emissions do not increase sufficiently that the change is deemed a "modification" of the plantwide source for purposes of the new source review. See *supra* p. 5 note 6.

[9] See 40 C.F.R. 51.18(j)(1)(ii), (iii) (1981); and 40 C.F.R. 52.24(f)(2), (3) (1981).

quired to subject new and modified emission producing equipment units located in nonattainment areas to new source review under all circumstances where emissions from the specific equipment increased by more than threshold amounts (see *supra* p. 5 note 6) irrespective of any actual effect upon aggregate plant emissions or air quality. They were also required to subject an entire plant to new source review if emissions from the plant as a whole increased by more than a threshold amount, even if no increase exceeding the threshold occurred at any particular unit. See 45 Fed. Reg. 52676, 52696-52698 (1980).[10]

Seven months later EPA proposed to restore the "plantwide" definition of source for nonattainment new source review. 46 Fed. Reg. 16280 (1981) (82-1247 Pet. App. 10a-18a). That definition was formally promulgated on October 14, 1981. 40 C.F.R. 51.18(j)(1)(ii); 40 C.F.R. 52.24(f)(2); see 46 Fed. Reg. 50.66 (1981) (82-1247 Pet. App. 19a-33a).[11] EPA identified two concerns as warranting this

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[10] In addition, the August 7, 1980 regulations treated substantially reconstructed process units as new sources. 40 C.F.R. 51.18(j)(1)(ix) (1981); 40 C.F.R. 52.24(f)(9) (1981). The effect of this approach was to require formal new source review of such reconstructed facilities even when emissions were not greater than those of the equipment superseded. See *supra* p. 5 note 6 & p. 7 note 8.

[11] In the October 14, 1981, regulations EPA also eliminated the special reconstructed source rule that had been adopted in 1980 (see *supra* note 10), explaining that in light of the plantwide definition of source adopted, a reconstruction requirement no longer was necessary. The agency anticipated that an entire plant rarely would be reconstructed (82-1247 Pet. App. 25a-26a).

change. First, the revised definition conformed to the definition previously established for stationary sources under the separate Prevention of Significant Deterioration (PSD) program established by the 1977 Amendments to the Act, Section 160-169, 42 U.S.C. (Supp. IV) 7470-7479 (82-1247 Pet. App. 32a).[12] Second, EPA concluded that states should have discretion as to how to define "stationary sources," provided that their SIPs still meet the basic requirements of the statute (*id.* 23a-25a). Accordingly, EPA explained that states could shift to a plantwide definition only if they could "demonstrate that their plans, as revised, continue to demonstrate [reasonable further progress] and attainment"—the fundamental statutory requirements (82-1247 Pet. App. 24a).

4a. On November 18, 1981, the Natural Resources Defense Council ("NRDC"), Citizens for a Better Environment, Inc. and the Northwestern Ohio Lung Association, Inc., filed a petition for review of the EPA's October 1981 regulations in the United States Court of Appeals for the District of Columbia Circuit.[13] NRDC argued that the amended definition was in-

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[12] The PSD program is designed to prevent the deterioration of air quality in areas in which ambient air is cleaner than required by national standards. The agency adopted a plantwide definition of "stationary sources" for PSD purposes at the same time it adopted the dual definition for nonattainment new source review. Maintenance of disparate definitions was deemed burdensome by EPA because an area may be designated "attainment" for one pollutant and "nonattainment" for another, and a single plant may therefore be subject to both sets of rules.

[13] Under Section 307(b)(1) of the Act, 42 U.S.C. (Supp. IV) 7607(b)(1), the D.C. Circuit has exclusive jurisdiction to entertain actions for judicial review of nationally applicable regulations promulgated by EPA.

valid for three reasons. First, it was alleged to conflict with what NRDC characterized as a longstanding congressional understanding that the term "source" comprehended each item of process equipment within a plant. Second, NRDC argued that EPA's plantwide definition conflicted with the fundamental purposes of the nonattainment program because it exempted from new source review many new facilities that would be subject to review under the dual definition. Third, NRDC contended that under prior decisions of the D.C. Circuit, use of a plantwide source definition was permissible only for programs intended for air quality maintenance and was forbidden for programs directed at air quality enhancement, such as the nonattainment program established in 1977 in Part D of the Clean Air Act.

In response, EPA observed first that neither the statute nor the legislative history prescibed a particular definition of "source". The agency argued further that there was no evidence of a settled or clear congressional understanding of the term. EPA contended that given the absence of controlling language or legislative history, adoption of the plantwide definition was a reasonable exercise of its discretion. EPA argued that its regulations carried out Congress' intention that economic growth be allowed to occur in nonattainment areas to the extent consistent with the drive toward attainment and the deadlines for attainment established by the 1977 Amendments. Finally, EPA argued that the D.C. Circuit's previous decisions cited by NRDC were inapposite because the regulatory programs considered in those decisions were substantially different in design and purpose from the Part D new source review program.

b. The court of appeals granted the petition for review and vacated EPA's October 14, 1981, regulations (82-1005 Pet. App. A-20). The court did not respond directly to EPA's contentions; nor did it rely on the primary arguments advanced by NRDC. The court acknowledged (82-1005 Pet. App. A-8, A-17 note 39) that (as EPA contended) neither the statutory language nor the legislative history prescribed any definition for the term "stationary sources." The court nevertheless concluded that two of its prior decisions, *ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (1978) and *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (1979), required rejection of the Agency's regulations. Those decisions, in the court's view, together established (82-1005 Pet. App. A-16; emphasis added)

> a bright line test for determining the propriety of EPA's resort to a bubble concept. The bubble concept * * * is *mandatory* for Clean Air Act programs designed merely to maintain existing air quality; *it is inappropriate* * * * in programs enacted to improve the quality of ambient air.

Pretermitting any view as to "the decision we would reach if the line drawn in *Alabama Power* and *ASARCO* did not control our judgment" (*id.* at A-4 note 7), the court summarily concluded that because the overall objective of the entire *nonattainment program* was to ameliorate air quality so as to achieve conformity with national air quality standards, a plantwide definition of the term source may not in any circumstances be employed for purposes of the new source review program (*id.* at A-17 to A-18). The court deemed irrelevant to its consideration evidence that Congress intended to allow the states a substantial measure of flexibility in achieving the required air quality standards, and the fact that the

new source review program is but one facet of the larger nonattainment program (*id.* at A-18 to A-19). These considerations were thought not to reflect the controlling purpose of the nonattainment program. The court stated (*id.* at A-19)

> In the *Alabama Power-ASARCO* context, "purpose" clearly means goal, objective. The goal of the nonattainment program is undoubtedly to improve air quality in regions lagging behind in meeting the NAAQSs.

In the court's view that purpose precluded use of the plantwide "stationary source" definition.[14]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is contrary to well established limits upon the scope of judicial review of administrative action. Remarkably, the Agency's regulation was invalidated even though the court of appeals acknowledged that it was unable to discern any controlling statutory language or legislative history. In the circumstances, the agency acted well within its authority, Section 301(a)(1), 42 U.S.C. (Supp. IV) 7601(a)(1), to promulgate regulations to carry out the purposes of the Act. And the court of appeals was without authority to invalidate the agency's regulations so long as they rested upon a reasonable interpretation of the Act. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 86 (1975).

Instead of pointing to any controlling statutory language or legislative history, the court of appeals'

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[14] The court also invalidated EPA's deletion of the reconstructed facilities rule, (See *supra* p. 8 notes 10 & 11) reasoning that that aspect of the agency's action depended upon its adoption of the plantwide source definition (82-1005 Pet. App. A-19 to A-20).

decision rests upon a bright line rule ostensibly established by its prior decisions, the application of which turns upon the overall purpose of the statutory program. But in the setting of this case the purpose attributed to Congress is entirely an artifact—it does not rest upon statutory language or legislative history, and thus reflects only the policy judgment of the court of appeals. And the dichotomy applied by the court of appeals caused it to reject as irrelevant critical features of the actual statutory design. Thus, while the ultimate purpose of the nonattainment program as a whole is assuredly to achieve an improvement in ambient air quality, that mandate for improvement is not open-ended; the statutory objective is attainment of specific air quality standards. Moreover, the new source review program is merely one of an arsenal of tools which Congress required the states to employ in the pursuit of those standards. The statute and legislative history make clear that the states were to have substantial discretion as to how the specific tools made available under the Act were to be balanced in a state implementation plan. The court of appeals' conclusion that the air quality improvement purpose of the nonattainment program required adoption of a particular definition of a term Congress did not define is accordingly unsound.

This Court has recognized that Congress intended in the Clear Air Act to allow the states substantial discretion in selecting the measures necessary to meet the air quality improvement goals established by Congress and the Agency. *Train* v. *Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 79. The decision of the court of appeals, however, requires the Agency to disapprove implementation plans submitted by 31 states even if they meet all of the requirements

of the Clean Air Act, simply because they provide for attainment through strategies that accommodate a plantwide approach to new source review. Absent a compelling indication that Congress constrained the agency to reject such plans—and none has been identified in this case—that is an impermissible result.

The question presented is of substantial national importance, affecting the regulatory agencies of 31 states, and thousands of businesses subject to their jurisdiction. Because exclusive jurisdiction in this matter is by statute vested in the D.C. Circuit (save only for this Court), and because that court declined to reconsider its decision en banc, further review is warranted.

1. The decision of the court of appeals significantly alters the historic federal-state relationship created by Congress to deal with air pollution, by depriving the states of flexibility to determine how they will achieve the primary national ambient air quality standards.

a. From the first congressional efforts in 1955 to abate the problems of air pollution, Act of July 14, 1955, ch. 360, 69 Stat. 322, to the present, the individual states have been vested with primary responsibility for the control and prevention of air pollution at its source. This was so under the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, and under the comprehensive amendments adopted by Congress in 1970, Pub. L. No. 91-604, 84 Stat. 1676. Although the 1970 amendments sharply increased the federal responsibility for air pollution control, they explicitly preserved the principle of state responsibility: "[E]ach State shall have primary responsibility for assuring air quality within the entire geographic area comprising such State * * *." Section 107(a),

42 U.S.C. 1857c-2(a) and 42 U.S.C. (Supp. IV) 7407(a).[15] This Court described the federal-state partnership in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975):

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. [Footnote omitted.]

Congress did not abandon this principle in enacting the 1977 Amendments to the Act. In Part D to the 1977 Amendments, 42 U.S.C. (Supp. IV) 7501-7508, Congress developed a detailed strategy requiring the revision of all state implementation plans for those areas of the country that were not yet in attainment. As the House noted, Part D had "two main purposes:"

> (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) *to allow States greater flexibility for the former purpose than EPA's present interpretative regulations afford.*

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 221 (1977) (emphasis added). In addition, the Senate stated that a "fundamental concern" was "[t]he need to augment the responsibility, authority, and effective-

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[15] See also Section 101(a)(3), 42 U.S.C. 1857(a)(3) and 42 U.S.C. (Supp. IV) 7401(a)(3): "the prevention and control of air pollution at its source is the primary responsibility of States and local governments."

ness of State and local air pollution control programs" because "[t]he problem of air pollution exists at the State and local level [which] is where the public understands the problem [and] where the resources must be directed." S. Rep. No. 95-127, 95th Cong., 1st Sess. 10 (1977). Accordingly, Congress amended the Act to give the states "additional time and flexibility" (*id.* at 3) to revise their plans in order to attain the ambient standards and meet the new requirements of Section 172(b), 42 U.S.C. (Supp. IV) 7502(b). As the Senate noted (S. Rep. No. 95-127, *supra*, at 10):

> The authority of States and localities to implement air pollution control programs within the framework of a national policy must be encouraged. The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals. States and localities are given broad discretion to make decisions, while maintaining the minimum national air quality baselines designed to protect health and welfare, prevent discrimination among States, protect national resources within States, and provide guidance on the technical and the economic implications of various national policies * * *.
>
> Proper implementation of the amendments in this bill will significantly enhance the Federal-State relationship and will provide the States and localities with the flexibility they need, while at the same time providing a mechanism to assure that national policy is implemented.

Thus, it is clear that the Act and its legislative history reflect the continuing intention to leave states considerable latitude in achieving the mandated emission reductions, both generally and with specific reference to the nonattainment program of Part D.

b. The court of appeals decision strips the states of significant latitude in applying Part D in their efforts to achieve attainment. As promulgated by EPA, the plantwide definition of source is an optional strategy that the states may, but need not, select, and that is available only under carefully limited circumstances. In adopting a plantwide definition of source for this program, the Agency has acted in keeping with the Act. As promulgated by EPA, the plantwide definition of source is available to the states only if they "demonstrate that their plans, as revised, continue to demonstrate [reasonable further progress] and attainment," and thus continue to satisfy the basic statutory requirements (82-1247 Pet. App. 24a). And the plantwide definition does not permit construction or modification of a process unit unless any increased emissions are offset by decreased emission from another component within the same facility so that aggregate emissions do not increase beyond a de minimis level. Thus, the plantwide definition gives states the flexibility and the authority to determine how to structure their new source review programs. Yet, it insures that the states remain subject to the overriding statutory command that their state implementation plans satisfy the requirements established by Congress.[16]

There is no suggestion in the court of appeals' opinion that by employing the plantwide definition for

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[16] Promoting state flexibility is not an abstract concern. In several areas around the country the major cause of nonattainment is automobile-related pollutants (carbon monoxide and ozone) and not stationary source emissions. Only by reducing automobile emissions can attainment be expected in

new source review, the states would be unable to demonstrate achievement of the attainment goals established by Congress. The court apparently deemed that question irrelevant (82-1005 Pet. App. A-18 to A-19). Instead, the panel faulted the Agency for conferring undue flexibility upon the states. Contrary to the court of appeals' suggestion (*id.* at A-19), however, the Agency's regulations do not allow the states to determine *whether* federal requirements such as new source review should be applied. The issue, of course, is not whether a state must have a new source review program as part of its revised state implementation plan. Clearly it must. Rather, the question is whether the states may be allowed to determine the scope to be afforded that program and latitude to employ those strategies they find most effective in meeting the attainment goal established by Congress, when the statutory language does not require a particular choice of strategy. *Train* v. *Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 69; and *Union Electric Co.* v. *EPA*, 427 U.S. 246, 266 (1976), strongly suggest that such latitude exists under the Act. The court of appeals' decision, however, compels EPA to disapprove any SIP employing a plantwide definition, even where the state has demonstrated that an equipment-specific definition of source is not necessary to insure timely

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such areas. Hence, it makes little sense to force a state to expend its resources performing full-blown reviews of modifications of stationary sources when such review will have little material impact on ambient air quality. It is far more fruitful to allow such a state to focus its energies on more productive pollution reduction endeavors. The plantwide definition of source allows for precisely this sort of flexibility.

attainment of the standards. The result is plainly contrary to congressional intent, and this Court's decisions.

2. In repudiating the Agency's definition of source for failing to satisfy the "purpose" of the nonattainment program, the court of appeals violated established principles of judicial review. This Court has "accorded great deference to the Administrator's construction of the Clean Air Act." *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 256. The Agency's interpretation of the Act need only be "sufficiently reasonable" to survive judicial scrutiny. *Train* v. *Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 87. These principles apply with special force, we submit, when Congress has given no guidance on an issue that the Agency is perforce obliged to address. See *FCC* v. *National Citizens Committee For Broadcasting*, 436 U.S. 775, 813-814 (1978).

The decision below is irreconcilable with these fundamental tenets of judicial review. The court acknowledged that neither the statutory text nor its legislative history offered any clear guidance respecting the meaning to be assigned to the term "stationary sources" (82-1005 Pet. App. A-8, A-17, n.39). Yet, the Agency's effort to fill this statutory vacuum was rejected because it was thought to be out of harmony with the larger purpose of the nonattainment program as a whole. Both the court's analytical approach and its understanding of the Clean Air Act were seriously flawed.

a. According to the court of appeals, for the purpose of defining a source, every program under the Clean Air Act has one of two purposes: enhancement of air quality or maintenance of existing air quality. In the court's view, if the provisions of the Act for

which a plantwide definition have been proposed fall on the enhancement side of this "bright line," such a definition is *precluded.* If the provisions for which the definition has been proposed pertain to maintenance, the definition is *mandatory.* Just as the court's decision deprives states of flexibility in implementing a key provision of the Act, it also strips the Agency of any discretion to interpret it. As a result of the court's test, the Agency never has any discretion to define what a source is—a remarkable conclusion given Congress' silence on the subject.

The application given this judicial litmus test is unacceptable for two additional reasons. First, the court of appeals did not even suggest that the result of its application conforms to congressional intent, which, of course, is the proper standard for determining the validity of the agency's regulations. The court's insistence that its decision was compelled by a "bright line" test derived from its other decisions should not be permitted to disguise the fact that the court's decision, because not based on legislative intent, represents a departure from the "narrow confines of the law into the more spacious domain of policy" (*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941)).

Second, the court of appeals' reasoning rides roughshod over the statutory design. The new source review program is but one component of the larger nonattainment program. The nonattainment program itself requires improvement of air quality to meet fixed standards; it is not a mandate for the maximum feasible reduction in emissions. Accordingly, it simply does not follow from the overall ultimate purpose of the nonattainment program that new source review must be applied on a unit-by-unit basis rather than a plantwide basis. Thus, EPA's 1981 regulations

are fully consistent with the purpose of the nonattainment program as reflected in the statutory language itself.

b. The court of appeals' prior decisions in *ASARCO* and *Alabama Power* do not support its decision in this case. In each of those cases the court of appeals undertook to determine whether a plantwide definition of sources subject to a particular Clean Air Act program was consistent with legislative intent. In *ASARCO*, the court of appeals concluded that application of a plantwide approach under the technology-based new source performance standards (NSPS) program was contrary to legislative intent. 578 F.2d at 327-329.[17] In *Alabama Power*, by contrast, the court held that use of a plantwide definition was mandatory under the Prevention of Significant Deterioration (PSD) program because Congress intended sources to undergo review "only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Alabama Power*, *supra*, 636 F.2d at 401.

Although the D.C. Circuit took pains in *Alabama Power* to distinguish its holding there from its prior holding in *ASARCO*, it did not do so on the basis of the "bright line" test suggested by the panel here. The distinction recognized was tied instead to fundamental differences in regulatory design between the NSPS and PSD programs. This was not the simplistic dichotomy between air quality enhancement and maintenance constructed by the panel in this case. Rather, the distinction observed was between the

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[17] The new source performance standards program was created by Section 111 of the Act in 1970, see 42 U.S.C. 1857c-6 and 42 U.S.C. (Supp. IV) 7411, and applies irrespective of the air quality of an area.

technology-forcing design of the NSPS program, which requires the installation of stringent emission controls on new emission producing equipment *without regard to existing air quality, see ASARCO, supra*, 578 F.2d at 328-329, and the intent of the PSD program, which is concerned with the impact of new source construction on existing air quality. *Alabama Power, supra*, 636 F.2d at 401.

Differences between the NSPS program and the nonattainment new source review program are of critical significance here. As discussed above, the NSPS program is a technology-based program that applies without regard to the impact of a regulated facility's emissions on ambient air quality. NSPS requirements apply whether or not ambient standards have been attained and continue to apply for the life of the plant. The NSPS program employs a single means: a long-term, technology-forcing program designed to increase the pollution control efficiency of industrial plants as capital stock is replaced. In contrast, the nonattainment new source review program is inextricably linked to ambient air quality. It is called into play only in those areas in which national ambient air quality standards have not been attained, and its application terminates when the standards have been achieved.[18] In addition, the nonattainment

[18] The panel declined to distinguish between the NSPS program and the nonattainment new source review program, noting that the latter program contains a technology-forcing component as well (82-1005 Pet. App. A-16 n.38). What the court failed to realize is that the PSD program also contains a technology-forcing component. See Section 165(a)(4), 42 U.S.C. (Supp. IV) 7475(a)(4). Hence, the mere existence of a technology-forcing component is no basis for rejecting the suggested distinction. The issue is not whether a program contains a technology-forcing component, but *when* the program, with its technology-forcing component, should be triggered. In the Agency's view, the Part D new source review

program employs several different strategies, of which new source review is but one, to ensure attainment of the national standards.[19]

The decision of the court of appeals in this case is thus unsupported by the rationale of its prior decisions. In place of the analysis employed in the court's prior decisions, which focused upon congressional intent, the court has now drawn an arbitrary line that does not respond to actual legislative intent, and that allows no room for exercise of administrative discretion in circumstances, such as those presented, where Congress has not confined the Agency in its implementation of the Act.

3. The issue presented by this case is of substantial practical importance, for, pursuant to the Agency's regulations, 31 states have sought to adopt a plantwide approach to new source review. Under the court of appeals' decision, however, the Agency is compelled to disapprove those states' SIPs and to require the submission of revised versions that return to a dual definition of source. If new source review may not be conducted on a plantwide basis, each state will be required to carry out time-consuming preconstruction

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program, like the PSD program, should be triggered only when emissions will increase by more than a de minimis amount.

[19] See *supra* p. 5. The provisions of the nonattainment program directed at reduction of existing excessive emissions were necessarily the primary instrument adopted for achieving attainment. The new source review program was never intended to carry the full load of insuring attainment of the national standards; on the contrary, it was principally designed to make certain that emissions from new or modified sources do not undercut a state's affirmative attainment strategy.

review of individual modifications to existing plants, even if the state demonstrates, and EPA finds, that such reviews are not necessary to ensure attainment and maintenance of the national standards. Moreover, in adopting the 1981 regulations, the agency determined that the plantwide definition would remove disincentives to plant modernization (82-1247 Pet. App. 26a). The decision of the court of appeals may accordingly have adverse economic impacts that are not required by the terms of the Clean Air Act.

Finally, review by this Court is necessary because there is no possibility of litigating the issue further in another court of appeals. Pursuant to Section 307(b)(1), 42 U.S.C. (Supp. IV) 7607(b)(1), the D.C. Circuit has exclusive jurisdiction to review EPA regulations of nationwide applicability. Further review is available only in this Court.

To be sure when Congress revisits the Clean Air Act, it may speak to this issue and provide a definition for the term at issue in this case. But given Congress' failure to act in the past, uncertainty as to whether and when it will act in the future, and the present importance of the issue, review by this Court is warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 401961 1315